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No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONORABLE ED JONES, CHAIRMAN OF THE SUBCOMMITTEE ON SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES' COMMITTEE ON HOUSE ADMINISTRATION, ET AL.,

Petitioners,

V.

ANNE W. WALKER,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR ANNE W. WALKER

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QUESTIONS PRESENTED

Whether the Chairman, who is a member of Congress, and the Staff Director, of the House of Representatives' Subcommittee on Services of the Committee on House Administration are immune from civil liability under the Speech or Debate Clause of the Constitution for their alleged discriminatory (gender-based) and wrongful discharge of the General Manager of the House of Representatives' Restaurant System.

PARTIES INVOLVED

The parties to this Petition are the Honorable Ed Jones, Congressman and Chairman of the Subcommittee of Services, Committee on House Administration of the House of Representatives, and Thomas Marshall, the Subcommittee's former Staff Director, petitioners; and Anne W. Walker, former General Manager of the House of Representatives' Restaurant System, respondent.

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HONORABLE ED JONES, CHAIRMAN OF THE SUBCOMMITTEE ON SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES' COMMITTEE ON HOUSE ADMINISTRATION, ET AL.,

Petitioners,

V.

ANNE W. WALKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent Anne W. Walker, former Manager of the House of Representatives' Restaurant System, through her attorneys, pray for the denial of the issuance of a writ of *certiorari* sought by petitioners, the Chairman and a former Staff Director of the House of Representatives' Subcommittee on Services, Committee on House Administration, for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on May 1,

1984, in favor of respondent and against petitioners in this proceeding.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 6, Clause 1 of the Constitution of the United States of America provides in pertinent part: ". . . and for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other place."

The Fifth Amendment to the Constitution of the United States of America provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case involves an action for damages, reinstatement, and declaratory and injunctive relief, arising out of the allegedly discriminatory (gender-based) and wrongful discharge of respondent Anne W. Walker as General Manager of the House of Representatives' Restaurant System (hereinafter, the "House Restaurant System"), in violation of her liberty and property interests and of the Equal Protection component of the Due Process Clause of the Fifth Amendment (Complaint, Paras. 20–40; Pet. App. D at 8d–11d). Facts alleged in the complaint on September 23, 1982 are summarized below.

In December 1970, Anne W. Walker was hired by the Subcommittee to manage the House Restaurant System (Complaint, Para. 7; Pet. App. D at 4d). At the time of her employment, and throughout her employment, she was led to believe that so long as her duties were performed in a proper and efficient manner, her employment would be permanent and would continue. This belief was based on well-known personnel policies of the Subcommittee, and on

Anne W. Walker's conversations and communications with the Subcommittee Chairman and with other Subcommittee members and staff of the Subcommittee to the effect that employees not involved in the legislative process are discharged only for valid cause and reason relating to improper or inadequate job performance. (Complaint, Para. 9; Pet. App. D at 4d.

Anne W. Walker was employed in various positions in the House Restaurant System for a period of approximately ten years (Complaint, Para. 11; Pet. App. at 5d). During this period she changed the financial position of the House Restaurant System from a loss to a net profit in excess of three million dollars (Complaint, Para. 11; Pet. App. at 5d); managed, controlled, and operated the House Restaurant System without intervention or criticism (Complaint, Para. 14, Pet. App. D. at 6d); and was led to believe and understand that her performance was at all times satisfactory (Complaint, Paras. 9, 14, and 15; Pet. App. D at 4d–6d). Indeed, during 1980, Chairman Jones increased the salary of Anne W. Walker by eight thousand dollars per annum to forty-five thousand dollars per annum because of the efficient manner in which she operated the House Restaurant System (Complaint, Para. 14; Pet. App. D at 6d).

In May 1982, at her request, Anne W. Walker met with Congressman Jones and Thomas Marshall, the Staff Director of the Subcommittee, at which time she detailed the operations and profit structure of the House Restaurant System. They made no comment and expressed no dissatisfaction with her performance; and, concluded the meeting without criticism. (Complaint, Para 15; Pet. App. at 6d.)

Early in 1982, Congressman Jones indicated to others that because of Anne W. Walker's sex she was overpaid and that her salary was "ridiculous for a woman" (Complaint,

Para. 13; Pet. App. D. at 5d–6d). On June 22, 1982, Congressman Jones notified Anne Walker of her discharge (Complaint, Para. 16; Pet. App. D at 6d–7d):

> It is with regrets that I must terminate your employment as general manager of the House Restaurant System effective June 30, 1982," . . . as "best for the future of the Restaurant System" . . . "Sincerely yours, Ed Jones, Chairman."

In July 1982, Congressman Jones and Staff Director Marshall hired a male person as General Manager (Complaint, Para. 18; Pet. App. D at 7d).

After Anne W. Walker's discharge, Congressman Jones made knowingly false public statements and representations that she was discharged because she (1) operated the House Restaurant System inefficiently and at a loss, (2) engaged in improper and/or illegal bookkeeping practices, and (3) engaged in misappropriation and "skimming" of funds from the House Restaurant System (Complaint, Para. 19; Pet. App. D at 7d–8d).

On February 15, 1983, the District Court dismissed the complaint in its entirety on the sole ground that "the discharge of a House Restaurant employee, pursuant to authority granted by a congressional subcommittee, is an action within the 'legislative sphere'." (Memorandum decision; Pet. App. B at 3b.) The District Court reasoned:

> Actions related to the internal administration of Congress have been found to be protected legislative acts. For example, the seating of the press in the House and Senate galleries, *Consumers Union of the United States, Inc. v. Periodical Correspondents Association*, 515 F.2d 1341 (D.C. Cir. 1975) *cert. den.* 423 U.S. 1501 (1976) . . . have been found to be legislative action

> protected by the Speech or Debate Clause. In addition, this District Court has previously held that the administration of a congressional restaurant "while it may not attain the magnitude of some congressional duties, is clearly an activity which is within the 'legislative sphere'." *Parker v. Allen*, et al., No. 74–1846, slip op. at 9 (D.D.C. June 6, 1975).
>
> The cases indicate that actions of Congress in making "internal arrangements for its own necessities" are within the "legislative sphere."

On May 1, 1984, the Court of Appeals reversed the dismissal of the complaint as to Congressman Jones and Staff Director Marshall on the ground that "personnel actions of the kind Jones and Marshall are alleged to have taken, if effected for unlawful reasons, do not fall within the legislative functions to which the absolute immunity of the Speech or Debate Clause attaches." (733 F.2d 934, Pet. App. A at 19a).[1] The Court of Appeals reasoned that food service work is not legislative in nature (733 F.2d 934; Pet. App. A. at 14a); and, that it would "demean the high purpose of the speech or debate privilege to extend it to official activities of Congress members and their aides in 'mundane fields' outside 'the legislative core.' *Davis v. Passman*, 544 F.2d 865, 880 (5 Cir. 1977); *rev'd on other grounds*, 571 F.2d 793 (5 Cir. 1978) *(en banc)*, *rev'd* 442 U.S. 228 (1979)," (733 F.2d 929; Pet. App. A at 10a.) That Court also distinguished *Consumers Union of the United States, Inc. v. Periodical Correspondents Association*, 515 F.2d 1341 (D.C. Cir. 1975), on the ground that the press seating arrangements in were

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[1]The District Court dismissed to complaint as to Congressmen Mollohan and Coyne because the "complaint attributed no actual participation in the termination of Walker's employment . . ." to them (733 F.2d 925 n.1; Pet. App. A. at 2a–3a.)

intended to shield members of Congress from press member's use of their House access to lobby legislators (733 F.2d 930; Pet. App. A at 12a)—which unquestionably relates to the legislative business of the Congress. The Court of Appeals also noted that, in *Parker v. Allen*, No. 74–1846, slip op. (D.D.C. June 6, 1975; unpublished) the District Court concluded that the Capitol Architect who actually fired the head waiter of the Senate Restaurant System was not immune from suit under the Speech or Debate Clause, and awarded the head waiter substantial relief. The Court of Appeals also held that petitioners are not immune from suit under the doctrine of absolute immunity because the scope of that doctrine "does not extend beyond the scope of the Speech or Debate Clause. *See Harlow v. Fitzgerald*, 457 U.S. 800, 810–11 (1982); *Davis v. Passman*, 442 U.S. 228, 235 n.11, 246 (1979)." (733 F.2d 932; Pet. App. A. at 17a.)

The Court of Appeals further held that they had addressed the wrong issue with respect to qualified immunity: the question of the uncertainty of the law pertaining to the Speech or Debate Clause, rather than whether their conduct violated any "'clearly established statutory or constitutional right [of Anne W. Walker] of which a reasonable person would have known.' *Harlow v. Fitzgerald*, 457 U.S. at 818; *see also id.* at 807." (733 F.2d 932, 933; Pet. App. A. at 17a–18a).

The Court of Appeals also held that the allegations of Anne W. Walker's complaint are sufficient enough so as not to be subject to be dismissed for failure to state any claim upon which relief can be granted (733 F.2d 933; Pet. App. A at 18a–19a).[2]

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[2]Petitioners do not challenge this holding.

ARGUMENT

A. This Case Does Not Present Any Important Question Involving The Relationship Between The Legislative and Judicial Branches of Government.

Petitioners assert that this case presents the question of "whether Congressional decisions[3] to dismiss senior aides are shielded by the Speech or Debate Clause." (Petition at 7.) Petitioners contend that the Supreme Court should grant *certiorari* to review this issue because it involves an important issue concerning the relationship between the legislative and judicial branches of government, the significance of which was recognized in *Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979) (Petition at 7–8).

For the first time, in this Court, Petitioners contend, in substance, that the subject matter of Anne C. Walker's complaint is nonjusticable because the Court of Appeals "judgment fails to accord to the House the respect that any court owes a coordinate branch of government. (Judge MacKinnon dissenting, 733 F.2d 938; Petition at 11, *see also* Petition at 7–8). Petitioners rely on that part of the dissenting opinion of Chief Justice Burger, joined by Justices Powell and Rehnquist, in *Davis v. Passman*, 442 U.S. at

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[3]There is no allegation by Anne W. Walker in the complaint or elsewhere, and no evidence of record, to support petitioners' assertion that any "Congressional decision" was made to discharge her. The complaint merely alleges that in discharging her the petitioners engaged in acts in violation of her Constitutional rights. (733 F.2d 931; Pet. App. A. 14a–15a.) Likewise, there is no evidence of record to support petitioners' claims that (1) "[a]fter consideration of the matter in executive session, the subcommittee dismissed the [so-called] committee aide who served as General Manager of the Restaurant System." (Questions Presented, Petition at (i); and (2) "[t]he specific meeting of the Subcommittee which is the subject of the complaint was conducted in executive session." (Petition at 11 n.12).

250, which states that "long-accepted concepts of separation of powers dictate . . . that until Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed." (Petition at 8.) However, this dissent refers only to the staffs of Members of Congress who are considered to be "intimately a part of the policymaking and political process" where there is an "imperative need for loyalty, confidentiality, and political compatibility—not simply to a political party, an institution or an administration, but to the individual Member." *Davis v. Passman*, 442 U.S. at 250.

Anne W. Walker was neither such a Congressional staff member, nor an aide, or *alter ego* to the Subcommittee.[1] As the chief food service facility manager, she was completely removed from the legislative arena. She did not work for any Member of Congress; but rather, was an employee of the Subcommittee and worked directly for the Staff Director of that Subcommittee. The Staff Director was neither a member of Congress nor an aide to any Member of Congress.

Anne W. Walker's duties and responsibilities did not involve or influence any legislative functions or activities. Her discharge as General Manager of the House Restaurant

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[1]Petitioners suggest that Anne W. Walker, as General Manager of the House Restaurant System, was an agent or officer of the House of Representatives based on the holding in *Page v. District of Columbia*, 20 U.S. App. D.C. 469, 474 (1902), that persons conducting the restaurants of the Houses of Congress are not required to take out local liquor licenses because they are *quasi* agents or officers of the Houses. (Petition at 13 n.14.) It is apparent that this type of agency does not suggest, without more, that there was a close intimate relationship between the manager of the restaurants and their employers in the matters of legislative functions and activities—one of the factual predicates needed to establish that Anne W. Walker was an aide to the Subcommittee.

System could not, therefore, materially impact on the separation of power concerns which the Petitioners seek to raise. Absent this genuine issue concerning "lack of the respect due coordinate branches of government," *Baker v. Carr*, 369 U.S. 186, 217 (1962), "judicial review of [this] Congressional employment decision[ ] is constitutionally limited only by the reach of the Speech or Debate Clause of the Constitution, Art. I, §6, cl. 1." *Davis v. Passman*, 442 U.S. at 235 n.11. Thus, the merits of the Speech or Debate issue are properly before this Court. Anne W. Walker submits that the decision of the Court of Appeals on that issue is in all respects correct for the reasons set forth in its opinion (Pet. App. A).

B. The Decision of the Court of Appeals, Denying Speech or Protection To Personnel Decisions, Does Not Decide The Question In Any Way Which Conflicts With The Decisions Of This Court.

Petitioners assert that the Court of Appeals "jettisoned" the traditional test for the invocation of the Speech or Debate Clause and "invented and applied a novel and unprecedented criterion: whether the subject of the legislative action is in a 'mundane field' . . . as opposed to a matter 'of state.' 733 F.2d at 926; App. A at 4a." (Petition at 9.) However, this allegedly "blatant distortion of the classic test" (Petition at 9) articulated in *Gravel v. United States*, 408 U.S. 606 (1972) is nowhere to be found in the opinion of the Court of Appeals.

That Court understood, and correctly applied, the *Gravel* test when it stated that "[a]ctivities 'casually or incidently related to legislative affairs,' *id.* at 558 [*United States v. Brewster*, 408 U.S. 501 (1972)], but not 'part and parcel of the legislative process,' *Gravel v. United States*, 408 U.S. at

626, are outside the realm of Speech or Debate protection.'"(733 F.2d 929; Pet. App. A at 10a.)

In applying the *Gravel* test to the alleged violative conduct of the petitioner, the Court of Appeals drew the logical and common sense conclusions that (1) restaurant management does not involve any "functions relating to the process of lawmaking . . . "or" "'other matters' of state 'which the Constitution places within the jurisdiction of either House.' *Gravel v. United States*, 408 U.S. 606, 625 (1972);" and (2) "Selecting, supervising, and discharging a food facilities manager . . . is not reasonably described as work that significantly informs or influences the shaping of our nation's laws." (733 F.2d 926, 931; Pet. App. A. at 4a and 14a.) Accordingly, neither the decision nor the rationale of the Court of Appeals in any way conflicts with the decisions of this Court.

C. The Court of Appeals Did Not Decide Any Important Question Regarding Official Immunity Which Should Be Decided By This Court.

Petitioners assert that "this Court has not resolved the degree of official immunity—absolute[5] or qualified—concerning the dismissal of a Congressional aide." (Petition at 13.) This question was not considered by the Court of Appeals because that Court found as "far-fetched" the notion that Anne W. Walker was a Congressional aide, ranking aide, or *alter ego* of the Subcommittee. (733 F.2d 931; Pet. App. A at 13a–14a.) Accordingly, further consideration of this question is not warranted.

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[5]This Court has held that the doctrine of "absolute immunity" is coextensive with the Speech or Debate Clause as it applies to Members of Congress and their aides. *Harlow v. Fitzgerald*, 457 U.S. at 810–811; *Davis v. Passman*, 442 U.S. at 228.

Petitioners contend that the Court of Appeals erred in focusing its analysis of the qualified immunity criteria set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), on their alleged violative acts, rather than on Speech or Debate Clause bar to remedies for these acts; and, that so long as there is uncertainty as to whether the courts have jurisdiction governing Congressional personnel decisions, members of Congress and their aides must act at their peril (Petition at 14–15).

This Court has already held that "judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause . . . " *Davis v. Passman*, 442 U.S. at 235 n.11. It is clear from its opinion (733 F.2d 932, 933; Pet. App. A at 17a–18a) that the Court of Appeals properly applied the qualified immunity criteria of *Harlow v. Fitzgerald*.

As Chief Justice Burger stated in his dissent in *United States v. Brewster*, 408 U.S. at 507: "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process."

The integrity of the legislative process was not impinged by Anne W. Walker's operation and management of the House Restaurant System, or by her hiring, supervision, or firing.

The recurrent theme of petitioners' case is that, in discharging Anne W. Walker as General Manager of the House Restaurant System, they can violate her Constitutional rights with impunity because they are protected by the Speech or Debate Clause. But, "[n]o man [person] in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity."

United States v. Lee, 106 U.S. 196, 200 (1882), quoted with approval in *Davis v. Passman*, 442 U.S. at 246. Yet, the petitioners would have the Supreme Court condone their allegedly flagrant, unlawful firing of Anne W. Walker. "All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Id.*, 442 U.S. at 246. But the petitioners would have the Supreme Court place them above Anne W. Walker's Constitutional rights.

There is no moral, ethical, legal, or other good and sufficient reason why the petitioners should not be held responsible for violating Anne W. Walkers' clearly established Constitutional rights of which they knew or should have known.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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